Kamarudin bin Mamat v Ketua Polis Negara & Anor

HIGH COURT (MELAKA) — CIVIL SUIT NO 21–7 OF 1996
LOW HOP BING J
30 JUNE 2004

Administrative Law — Rights and liabilities of public servants — Disciplinary action — Whether there is procedural unfairness — Whether doctrine of autrefois convict applicable — Whether there is bias on witness

Administrative Law — Rights and liabilities of public servants — Dismissal — Whether dismissal of police officer valid — Whether dismissal procedure unfair — Whether doctrine of autrefois convict applicable

Civil Procedure — Pleadings — Departure from — Unpleaded issues — No reference of unpleaded issues in statement of claim or agreed facts — Counsel tries to adduce unpleaded issues — When can unpleaded issues be raised

The plaintiff commenced an action against the defendants for a declaration that the plaintiff's dismissal was unlawful, unconstitutional, void and of no effect and that the plaintiff was still a Chief Inspector in the Police Force and entitled to all its salaries, benefits and perks. The main issue for determination was whether the dismissal of the plaintiff was valid. It was argued by the plaintiff that his dismissal was in violation of art 135(2) Federal Constitution and general order 26 Chapter D. The plaintiff's counsel also tried to adduce evidence relating to his alleged reduction in rank and transfer, when these issues had never been pleaded. It was also contended that by the plaintiff that the alleged unpleaded issues and the dismissal proceedings contravened the rule against double jeopardy. Further, the plaintiff also argued that there was bias on the part of DW1.

Held, dismissing the plaintiff's claim with costs:

(1) The procedural approach adopted by the plaintiff's counsel to persuade the court to consider unpleaded issues could not be upheld. The trial judge was not obliged to consider unpleaded issues and where a judge had decided on unpleaded issues, the judgment could be set aside and new trial ordered (see para 23).

(2) In the instant case, neither the statement of claim nor the parties agreed facts made any reference whatsoever to the unpleaded issues. Further, all materials which the defendants had taken into account had been made available to the plaintiff and so there was no denial of any rule of natural justice or procedural fairness (see para 28); *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 distinguished.

(3) The doctrine of double jeopardy had no application to the instant case since the dismissal proceedings were the only disciplinary proceedings against the plaintiff. Further, there was no evidence that the dismissal proceedings were based on the same facts as those in the unpleaded issues (see paras 30, 33–34).

(4) On the facts, the court was unable to find any 'real danger of bias' on the part of DW1, not even any reasonable suspicion of bias (see para 44).

(5) Applying the principles in *Utra Budi* to the facts and circumstances of the instant case, the defendants had occasioned no procedural unfairness in the entire decision which led to the dismissal of the plaintiff (see para 63); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 followed.

[Bahasa Malaysia summary

Plaintif memulakan tindakan terhadap defendan untuk satu deklarasi bahawa pemecatan plaintif menyalahi undang-undang, tidak berperlembagaan, batal dan tidak berkesan dan bahawa plaintif masih lagi Ketua Inspektor di dalam pasukan polis dan berhak ke atas semua penggajian, faedah dan keistimewaan. Isu utama untuk diputuskan ialah sama ada pemecatan plaintif adalah sah. Plaintif mengatakan bahawa pemecatan beliau mencabuli perkara 135(2) Perlembagaan Persekutuan dan perintah am 26 Bab D. Peguam plaintif cuba untuk mengemukakan keterangan berkait dengan penurunan pangkat plaintif, walaupun isu ini tidak pernah dirayu. Plaintif juga menegaskan bahawa isu-isu yang tidak dirayu itu dan pemecatan itu bercanggah dengan rukun 'double jeopardy'. Seterusnya, plaintif juga mengatakan bahawa terdapat kecenderungan berat sebelah memihak kepada DW1.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Pendekatan prosedur yang diambil oleh peguam plaintif untuk meyakinkan mahkamah untuk menimbang isu yang tidak dirayu tidak dapat diterima oleh mahkamah. Hakim perbicaraan tidak wajar menimbang isu-isu yang tidak dirayu dan sekiranya seseorang hakim itu membuat keputusan berdasarkan isu-isu yang tidak dirayu, penghakiman tersebut boleh diketepikan dan perbicaraan baru akan diperintahkan (lihat perenggan 23).

(2) Dalam kes semasa, tiada sebarang rujukan kepada isu-isu yang tidak dirayu dalam pernyataan tuntutan dan juga fakta yang dipersetujui. Seterusnya, kesemua bahan yang telah dipertimbangkan oleh defendan di dalam membuat keputusannya telah didedahkan kepada plaintif. Maka dari itu tiada percanggahan dengan rukun keadilan asasi atau keadilan prosedur (lihat perenggan 28); *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 dibeza.

(3) Rukun 'double jeopardy' tidak terpakai di dalam kes semasa kerana prosiding pemecatan adalah satu-satunya prosiding disiplin terhadap plaintif. Selanjutnya, tiada keterangan bahawa prosiding pemecatan berdasarkan pada fakta yang sama seperti dalam isu-isu yang tidak dirayu tersebut (lihat perenggan 30, 33–34).

(4) Berdasarkan fakta, mahkamah tidak mendapati sebarang 'bahaya nyata kewujudan kecenderungan berat sebelah' yang memihak kepada DW1, malahan tiada terdapat sebarang syak kecenderungan sebelah (lihat perenggan 44).

(5) Menggunapakai prinsip-prinsip dalam kes *Utra Budi* kepada fakta dan keadaan kes semasa, defendan tidak melakukan sebarang ketidakadilan prosedur dalam membuat keputusan memecat plaintif (lihat perenggan 63); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 diikut.]

Notes

For cases on departure from pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4525–4534.

For cases on disciplinary actions generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 637–639.

For cases on dismissal of police officers, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 640–673.

For pleadings, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.3-128]–[10.3-208].

Cases referred to

Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 2 MLJ 131 (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)

Chartered Bank, The v Yong Chan [1974] 1 MLJ 157 (refd)

Commodore Pty Ltd v Perpetual Trustee [1984] 1 NZLR 324

De Souza Lionel Jerome v Attorney General [1993] 1 SLR 882 (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302 (refd)

Harry Lee Wee v Law Society of Singapore [1985] 1 MLJ 1 (refd)

Jamali bin Adnan v PP [1986] 1 MLJ 162 (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417 (folld)

Lye Pong Fong v PP [1998] 6 MLJ 304 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321 (refd)

Mohamed Yusoff bin Samadi v Attorney-General [1975] 1 MLJ 1 (refd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 (refd)

R v Gough [1993] AC 646 (refd)

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (distd)

Singh Kalpanath, Re [1992] 2 SLR 639 (refd)

Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (refd)

Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393 (refd)

Wong See Leng v C *Saraswathy Ammal* [1954] MLJ 141 (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor [2001] 3 MLJ 385 (refd)

Legislation referred to

Federal Constitution arts 7(2), 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general order 26
Restricted Residence Act 1933
Rules of the High Court 1980 O 18

Marisa Regina (Aris Rizal Christopher Fernando & Co) for the plaintiff.
Mohd Naser bin Disa (Jabatan Peguam Negara) for the defendants.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] This is the plaintiffs claim against the defendants for a declaration that the plaintiffs dismissal from the Royal Malaysian Police Force ('the Police Force') is unlawful, unconstitutional, void and of no effect and that the plaintiff is still a Chief Inspector in the Police Force and entitled to all the salaries, emoluments and benefits due as such Chief Inspector, and also for damages, costs and interest.

FACTS OF THE CASE

[2] The statement of agreed facts as narrated in the submission for the plaintiff shows that the plaintiff has at all material time been a Police Inspector in the Police Force.

[3] Vide letter dated 28 August 1993, the first defendant informed the plaintiff of the disciplinary action to be taken to dismiss the plaintiff from the Police Force and directed the plaintiff to show cause why he should not be dismissed, pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, ('GO 26 Cap D') in relation to three charges brought by the first defendant against the plaintiff, viz:

(1) Bahawa anda, seorang Pegawai Awam iaitu Pemangku Penolong Penguasa Polls didalam Pasukan Polis Diraja Malaysia, ketika itu bertugas sebagai Pegawai Turus E4, Ibu Pejabat Polis Kontinjen Selangor, Shah Alam, telah didapati ingkar perintah iaitu melanggar peraturan KPN (PR) 132/35 bertarikh 11 Julai 1986, 19 September 1983, 12 Oktober 1983 dan 25 Februari 1984 iaitu pada 30 Jun 1991, anda telah membuat lawatan ke negara asing iaitu Kampong Kedai Baru, Mukim Sg Golok, Narathiwat, Selatan Thailand tanpa kebenaran bertulis daripada Ketua Jabatan dan oleh yang demikian anda telah melakukan satu kesalahan tatatertib dibawah perintah am 2(2)(i), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.

(2) Bahawa anda, seorang Pegawai Awam iaitu Pemangku Penolong Penguasa Polis di dalam Pasukan Polis Diraja Malaysia, ketika itu bertugas sebagai Pegawai Turus E4, Ibu Pejabat Polis Kontinjen Selangor, Shah Alam, telah didapati ingkar perintah iaitu sengaja melanggar peraturan KPN

39/37 bertarikh 28 Oktober 1988 iaitu pada 30 Jun 1991 di Kampong Kedai Baru, Mukim Sg Golok, Narathiwat, Selatan Thailand yang mana ketika itu anda masih lagi suami kepada Nor Alizah bte Ibrahim, KP: 6237702 telah bernikah kali kedua (berpoligami) dengan Zaidah @ Norjahan bte Mohd Hashim, KP: A3299400, tanpa mendapat kebenaran bertulis daripada Ketua Polis Negara dan oleh yang demikian anda telah melakukan satu kesalahan tatatertib di bawah perintah am 4(2)(i), Perintah-Perintah Am, Pegawai Am (Kelakuan dan Tatatertib) (Bab 'D') 1980.

(3) Bahawa anda, seorang Pegawai Awam iaitu Pemangku Penolong Penguasa Polis di dalam Pasukan Polis Diraja Malaysia, ketika itu bertugas sebagai Pegawai Turus E4, Ibu Pejabat Polis Kontinjen Selangor, Shah Alam pada 23 September 1992, jam lebih kurang 10.05 pagi, di Ibu Pejabat Polis Kontinjen Selangor, Shah Alam, telah didapati dengan sengaja tidak jujur memberi percakapan secara bertulis kepada PPP Alias bin Putih di dalam siasatan tatatertib dengan mengatakan bahawa pada 30 Jun 1991 anda telah bernikah dengan Zaidah @ Norjahan bte Mohd Hashim KP A3299400 di rumah Pak Su Ghani @ Ab Ghani bin Daud, Lot 639 Jalan Tepi Sungai, Rantau Panjang, Kelantan, tetapi sebenarnya anda telah bemikah dengan Zaidah @ Norjahan bt Mohd Hashim di Kampong Kedai Baru, Mukim Sg Golok, Narathiwat, Selatan Thailand dan oleh demikian anda telah melakukan satu kesalahan tatatertib di bawah perintah am 4(2)(f), Perintah-Perintah Am, Pegawai Awam (Kelakuan dan Tatetertib) (Bab 'D') 1980.

[**My translation**:

(1) That you, being a Public Officer, to wit, Acting Assistant Superintendent of Police at the time of carrying out the duties of a Staff Officer E4, in the Selangor Police Contingent Headquarters, Shah Alam, was found to be in breach of order, to wit, by contravening Order KPN (PR) 132/35 dated 11 July 1986, 19 September 1983, 12 October 1983 and 25 February 1984, to wit, on 30 June 1991 you made a visit to a foreign country, to wit, Kampong Kedai Baru, Mukim Sg Golok Narathiwat, South Thailand without the written permission from the Head of Department and you have thereby committed a disciplinary offence under general order 4(2)(i), Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980.

(2) That you, being a Public Officer, to wit, Acting Assistant Superintendent of Police in the Royal Malaysia Police Force, at the time of carrying out the duties of a Staff Officer E4 in the Selangor Police Contingent Headquarters, Shah Alam, was found to be in breach of order, to wit, intentionally contravening regulation KPN 39/37 dated 28 October 88, to wit, on 30 June 1991 in Kampong Kedai Baru, Mukim Sg Golok, Narathiwat, South Thailand while you were still the husband of Nor Alizah bt Ibrahim IC No 6237702, you married for a second time (polygamy) with Zaidah @ Norjahan bte Mohd Hashirn I/C A3299400, without obtaining the written permission from the Inspector General of Police and you have

thereby committed a disciplinary offence under general order 4(2)(i) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980.

(3) That you, being a Public Officer, to wit, Acting Assistant Superintendent of Police in the Royal Malaysian Police Force, at the time of carrying out the duties of a Staff Officer E4, in the Selangor Police Contingent Headquarters, Shah Alam, was found to have intentionally given a false written statement to ASP Alias bin Putin in a disciplinary investigation, by stating that on 30 June 1991 you married Zaidah @ Norjahan bt Mohd Hashim IC No A3299400 in the house of Pak Su Ghani @ Ab Ghani bin Daud at Lot 639, Jalan Tepi Sungai, Rantau Panjang, Kelantan but actually you married Zaidah @ Norjahan bte Mohd Hashim in Kampong Kedai Baru, Mukim Sg Golok, Narathiwat, South Thailand and that you have committed a disciplinary offence under general order 4(2)(f) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980.]

[4] The plaintiff was given the opportunity to make written representation to the Deputy Inspector General of Police ('Dy IGP') through the Director of Special Branch, Bukit Aman not later than 16 days from the date of receipt of the said show cause letter.

[5] In response thereto, the plaintiff had vide letter dated 25 September 1993 sent his representation to the Dy IGP. The plaintiff had admitted to all the three charges and has meanwhile included his plea in mitigation of sentence.

[6] Vide Dy IGP's letter dated 27 October 1993, the first defendant dismissed the plaintiff from the Police Force.

[7] In addition to the agreed facts, the plaintiff gave evidence for himself while the then Dy IGP testified for the defendants.

[8] From their respective evidence, I set out my observations and finding of facts as follows.

[9] The plaintiff had attempted to adduce evidence relating to his alleged reduction in rank from the post of Acting Superintendent of Police ('Ag ASP') and transfer, when these two issues had never been pleaded ('the unpleaded issues'). The defendants had vehemently objected. I shall revert to these unpleaded issues later in this judgment.

[10] The plaintiff then testified that he understood the content and consequence of the show cause letter, to which he had replied, admitting all the three disciplinary charges against him, without the need to apply for any further or better particulars or documents from the defendants. He did not ask to be present for an oral hearing. He also did not appeal against the dismissal. His reply to the show cause letter also included his plea in mitigation of sentence.

[11] The examination-in-chief of DW1, the then Dy IGP, substantially covered the agreed facts.

[12] Notwithstanding the aforesaid unpleaded issues and the objection by the learned senior federal counsel for the defendants, I have given plaintiffs learned counsel liberty to cross-examine DW1 on these unpleaded issues and indicated that I would make a ruling in relation to the admissibility of the evidence adduced on the unpleaded issues at the conclusion of the trial herein.

[13] Under cross-examination, DW1 testified that there was no reduction in rank from Ag ASP to Chief Inspector as the plaintiffs substantive post was that of a Chief Inspector at all material time and that the withdrawal of the post of Ag ASP was decided on by the directors of the various branches of the Police Force in Bukit Aman, and DW1 has agreed with the withdrawal.

SUBMISSION BY COUNSEL AND DECISION OF COURT

Issue for determination

[14] The issue for determination may be formulated as follows:

> Having regard to the aforesaid agreed facts, and the evidence adduced for the plaintiff and the defendants and in the light of the above finding of facts and upon considering GO 26 Cap D and art 135(2) of the Federal Constitution, is the dismissal of the plaintiff by the first defendant valid?

[15] For brevity and convenience, a reference hereinafter to a general order is a reference to that order in the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 and a reference to an article is a reference to that article in the Federal Constitution.

Raising unpleaded issues

[16] Cik Marisa Regina, learned counsel for the plaintiff, relied heavily on the unpleaded issues which she argued should be considered by this court, citing in support *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308.

[17] Encik Mohd Naser bin Disa, learned senior federal counsel, objected to the admissibility and consideration of the unpleaded issues as the prayer in the statement of claim merely pleaded for reinstatement to his substantive post as Chief Inspector.

[18] In my judgment, the answer to the plaintiffs submission is to be ascertained by reference to his statement of claim which, upon a proper perusal in its entirety, leads me to the obvious conclusion that it merely concerns a reinstatement to his substantive post as Chief Inspector. Hence, this submission for the plaintiff relates to matters which are completely outside both the pleadings and the agreed facts. The focus of the plaintiffs entire statement of claim was on his substantive post as Chief Inspector and his dismissal therefrom, as it has been so succinctly stated in prayer (1) thereof in the following words:

(1) A declaration that the plaintiffs dismissal from the Police Force is unlawful, unconstitutional, void and of no effect and that the Plaintiff is still a Chief Police Inspector in the Royal Malaysia Police Force and entitled to all the salaries, emoluments and benefits due as such Chief Police Inspector.

[19] In a writ action such as the instant case, the rules governing pleadings are to be found in O 18 of the Rules of the High Court 1980.

[20] The object of pleadings, as set out by Buhagiar J in *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 at p 142, (quoting *Bullen and Leake's Precedents of Pleadings*, 10th Ed p 1) are:

(1) to define the issues of fact and questions of law to be decided between the parties;

(2) to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial;

(3) to provide a brief summary of the case of each party, which is readily available for reference and from which the nature of the claim and the defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

[21] It is trite law that the parties herein are bound by their pleadings and the court is not entitled to decide a suit on a matter which is not pleaded and hence, the trial of the suit is confined to pleadings: see eg *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154.

[22] The rule of pleading is in line with the fundamental rule of natural justice, ie the right to be informed of any adverse point so that one has the opportunity of stating the answer: *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at p 418. Also see *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; and *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633.

[23] Obviously the procedural approach adopted by plaintiffs learned counsel to persuade the court to consider the unpleaded issues cannot be upheld. As a trial judge, I am not obliged to consider the unpleaded issues and where a judge has decided on unpleaded issues the judgment can be set aside and new trial ordered: *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157.

[24] In *Raja Abdul Malek Muzaffar Shah*, the plaintiff sought a declaration that his dismissal was null and void under art 135(2). One of the issues before the Court of Appeal was whether there was procedural unfairness as the defendants had taken into account 'lain-lain maklumat yang berkaitan' (other information relevant to the charges) which was not made available to the plaintiff and upon which the plaintiff was never given an opportunity to comment. In respect of 'other information relevant to the charges', the learned senior federal counsel submitted at p 315, by way of a second argument that 'the subject matter of the complaint was not sufficiently pleaded in his statement of claim and for that reason was not admissible'.

[25] Gopal Sri Ram JCA at p 320 held as follows:

> There is certainly a reference to the letter of dismissal in paragraph 8 of the statement of claim accompanied by an allegation in paragraph 9 that the plaintiff had not been given a reasonable opportunity of being heard.
>
> I respectively agree with the observation made during the cause of argument by my learned sister, Siti Norma Yaakob JCA, that once the fairness of the procedure adopted was sufficiently raised and challenged, then all maters relevant thereto were put in issue without the need for a specific plea in that respect. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Commodore Pty Ltd v Perpetual Trustee* [1984] 1 NZLR 324 at p 349.
>
> I really do not see how the defendants can complain that they were taken by surprise more so when they made no complaint before the trial judge when the point was raised for the plaintiff in his submission. Further, there is nothing in the judge's note to say that the argument was being disregarded because it was not pleaded. In these circumstances, I am convinced that there is no merit in the pleading point.

[26] The judgment of Gopal Sri Ram JCA is to the following effect:

(1) the issue has been pleaded in paras 8 and 9 of the statement of claim;

(2) fairness of the procedure was raised and challenged by the plaintiff;

(3) defendants were not taken by surprise; and

(4) there was nothing in the trial judge's note that the argument was being disregarded because it was not pleaded.

[27] The crucial point there was that the defendants had taken into account material which was not made available to the plaintiff and upon which the plaintiff was never given an opportunity to comment.

[28] By contrast, it is to be noted that in the instant case neither the plaintiffs statement of claim nor the parties' agreed facts made any reference whatsoever to the unpleaded issues. Further, all materials which the defendants had taken into account had been made available to the plaintiff and so there was no denial of any rule of natural justice or procedural fairness. Hence, the facts and circumstances before me are clearly distinguishable from those before the Court of Appeal.

Double jeopardy

[29] On the assumption that I have erred in my aforesaid decision on the unpleaded issues, I shall now proceed to consider the contention for the plaintiff that the alleged unpleaded issues, on the one hand, and the dismissal proceedings on the other hand, have contravened the rule against double jeopardy.

[30] Against that contention, the response from the defendant is that the said rule has no application to the facts and circumstances herein.

[31] At this juncture, it is appropriate and useful to revisit the principles governing the rule against double jeopardy as follows: A

(1) The rule against double jeopardy is one of the fundamental liberties enshrined in art 7(2) in the following words :

> 7 Protection against retrospective criminal laws and repeated trials
>
> (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted. B

(2) This is a constitutional entrenchment of the pleas of *autrefois acquit* or *autrefois convict*: per Chua J (as he then was) in *Mohamed Yusoff bin Samadi v Attorney-General*[1975] 1 MLJ 1. C

(3) The constitutional provisions in art 7(2) apply to criminal cases only and has no application to disciplinary matters which are governed by the common law doctrine of *autrefois* conviction and *autrefois acquit* (see (7) below): per Arifin Zakaria J (now JCA) in *Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor* [2001] 3 MLJ 385. D

(4) In order to operate as a bar under art 7(2), the accused must prove that the second prosecution or trial must be either (a) for the same offence or (b) of the same facts for any other offence for which a different charge from the one made against him might have been made: per George Sean SCJ in *Jamali bin Adnan v Public Prosecutor* [1986] 1 MLJ 162; E

(5) A person involved in illegal gambling activities and ordered to be restricted under the Restricted Residence Act 1933 may at the same time be charged in court with carrying out illegal gambling activities, and he is not entitled to rely on the plea of *autrefois convict* or the rule of double jeopardy, as the restricted residence order is not an imprisonment order, since there was no conviction: per Suriyadi J in *Lye Pong Fong v Public Prosecutor* [1998] 6 MLJ 304. F

(6) No principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal, and it was not improper for, eg the Public Service Commission to institute disciplinary proceedings as the exercise of its powers was not by way of punishment but rather to enforce a high standard or propriety and professional conduct: per Chua J (as he then was) in *Mohamed Yusoff*. G H

(7) The common law doctrine of *autrefois convict* and *autrefois acquit* would apply to disciplinary proceedings under a statutory code by which a profession was governed, so that a person cannot be subjected to two proceedings based on the same facts, and hence the order of suspension made against him in the first proceeding is a complete bar to further disciplinary action against him in the second proceeding: per Lord Bridge of Harwich in *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1; as followed by Arifin Zakaria J (now JCA) in *Zakaria Abdul Rahman*. I

[32] In order to avail himself of the common law doctrine against double jeopardy, it is incumbent upon the plaintiff to prove that:

(a) the dismissal proceedings are second disciplinary proceedings for the same disciplinary offence or offences as in the aforesaid three charges; or

(b) the dismissal proceedings are based on the same facts as those in the unpleaded issues.

[33] On the agreed facts and the evidence adduced herein, it is my specific finding that the dismissal proceedings were the only disciplinary proceedings against him. It appears obvious to me and I accept the evidence of DW1 that there was no reduction in rank as the plaintiffs substantive post was that of a Chief Inspector at all material time.

[34] Further, there is no evidence before me that the dismissal proceedings are based on the same facts as those in the unpleaded issues.

[35] That being the case, I hold that the plea of *autrefois convict* or doctrine of double jeopardy has no application to the instant case at all.

Bias on the part of DWl

[36] It was argued for the plaintiff that there was bias on the part of DW1. *De Souza Lionel Jerome v Attorney General* [1993] 1 SLR 882 (HC) Singapore; and *Re Singh Kalpanath* [1992] 2 SLR 639 (HC) Singapore were cited in support.

[37] For the defendant, it was stressed that there was no evidence of bias on the part of DW1, relying on *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321(FC).

[38] The decision as to whether bias may be attributed to any person must be decided by reference to the facts and circumstances of each individual case.

[39] In *De Souza Lionel Jerome*, the plaintiff, a police officer, was dismissed by his commanding officer after disciplinary proceedings were conducted before an authorized officer. The authorized officer had noted in the notes of proceedings his conviction that the principal witness (the complainant and the first to testify) was a truthful witness even before the cross-examination of the witness had been concluded and before any other evidence, including medical evidence material to the testimony of the witness was adduced. On these facts, Lim Teong Qwee JC of the Singapore High Court held that a reasonable person would have a suspicion of bias on the part of the authorized officer.

[40] The facts in *Re Singh Kalpanath*, revealed that the applicant, an advocate and solicitor, was found guilty of misconduct by the disciplinary committee ('the DC') and asked to show cause before a court of three judges. The applicant applied by originating motion for certiorari to quash the DC's findings on the ground that the chairman of the DC ('CS') was biased in that CS had met the applicant's legal assistant ('SS') twice during the currency of the DC's hearings, and had, inter alia, threatened or warned SS and suggested

to SS that he (CS) had made up his mind about the veracity of the witness. SS was a material witness for the applicant in the DC proceedings. Chan Sek Keong J quashed the DC's findings on the ground that the applicant had made out a case of apparent bias.

[41] The facts and circumstances showing obvious instances of bias in the two Singapore cases do not share any similarity with the facts and circumstances before me. I am of the view that they are clearly distinguishable and as such are of no assistance to the plaintiff.

[42] *Mohamed Ezam*, which is relied upon by the defendants, concerns an appeal against the decision of Augustine Paul J (now JCA) dismissing the appellant's motion for a writ of habeas corpus. At the commencement of the trial, the appellant had urged the learned judge to recuse himself from hearing the case on the ground that the learned judge had heard the case involving Dato Seri Anwar Ibrahim, the conviction and sentence was handed down on 14 April 1999 ('the Black 14 judgment') and that there was a reasonable apprehension on the part of a fair minded person that the learned judge might not bring an impartial mind to decide the case as such justice would be seen to be done. The only common factor between the appellant and the 'Black 14 judgment' was that the appellant was detained by the respondent for organizing demonstrations one of which was on 14 April 2001 which became the foundation of the 'Black 14' allegation of the respondent.

[43] The Federal Court through the judgment of Mohamed Dzaiddin Chief Justice Malaysia held that the test to be applied is the 'real danger of bias' test, ie having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application, following the Federal Court decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, which in turn followed the House of Lords decision in *R v Gough* [1993] AC 646 which applied the real danger test and rejected the reasonable suspicion test.

[44] Applying the judgment of the Federal Court to the facts and circumstances of the instant case, I am unable to find any 'real danger of bias' on the part of DW1, not even any reasonable suspicion of bias.

Article 135(2) and GO 26 General Orders

[45] It was argued for the plaintiff that his dismissal was in violation of art 135(2) and GO 26 Cap D, on the strength of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 (PC); and *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131 (CA).

[46] For the defendants, it was contended that the defendants have complied with the procedural fairness not only in accordance with GO 26 Cap D and art 135(2) but also in line with *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417.

[47] I shall now consider the authorities cited for the plaintiff. In *B Surinder Singh Kanda*, the plaintiff, a Police Inspector sought a declaration that his

dismissal from the Police Force was void on the ground, inter alia, that it was effected without being given a reasonable opportunity of being heard at the board of inquiry held by the Police Force, and that this was contrary to art 135(2). This ground was upheld by Rigby J in the High Court.

[48] On appeal by the defendant, the Court of Appeal held that the plaintiff was validly dismissed.

[49] The Privy Council, in holding that the dismissal was void enunciated that the right to be heard carries with it the right of the accused to know the case made against him, the evidence given and the statements made affecting him; and he must be given a fair opportunity to correct or contradict them. Whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.

[50] The facts there revealed that the report of the Board of Inquiry contained a severe condemnation of the plaintiff. That report was sent to the adjudicating officer before he sat to enquire into the charge. The adjudicating officer read it and had full knowledge of its contents. The plaintiff never had it nor an opportunity of dealing with it. He never got it until the fourth day of the hearing before Rigby J. Upon a query by Rigby J, the learned legal adviser for the defendant made the Report available to the plaintiff and his counsel. The report dealt in detail with the evidence of each witness heard by the board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement.

[51] The question was whether the hearing by the adjudicating officer was vitiated by his being furnished with the report without the plaintiff being given any opportunity of correcting or contradicting it. Rigby J, so did the Privy Council, gave the answer in the affirmative.

[52] The Privy Council's advice was followed by our Court of Appeal in *Ang Seng Wan*, where the facts were substantially similar in that the first respondent had caused summary of facts, report and statement of witnesses to be circulated to the members of the first defendant respondent without making them available to the plaintiff-appellant. The plaintiff-appellant was dismissed, although the plaintiff-appellant had denied all the four disciplinary charges against him, besides giving sufficient exculpatory statements to rebut all the charges. There was no evidence by the defendants to substantiate all the four charges.

[53] It is to be noted that the facts and circumstances in *S Surinder Singh Kanda* and *Ang Seng Wan* are entirely different from the facts and circumstances of the instant case. I am unable to conclude that those two cases are supportive of the case for the plaintiff herein.

[54] As a matter of law, the opportunity of being heard has been entrenched in art 135(2) and GO 26.

[55] Article 135(2) is set out below:

> No member of such a service shall be dismissed … without being given a reasonable opportunity of being heard …

[56] General order 26 consists of 11 paragraphs prescribing the procedural steps to be followed by way of disciplinary proceedings, in effect incorporating the concept of procedural fairness, including the opportunity of being heard to be afforded to an officer. **A**

[57] The facts and circumstances in the instant case clearly show that the plaintiff has been served with the show cause letter together with detailed particulars of the charges against him and that he was given the opportunity of making his representation which he did together with his plea in mitigation of sentence to be meted out against him. Further, the plaintiff has clearly understood all the charges against him and has made no attempt or taken any other steps such as applying for further and better particulars or documents, neither did he apply to be present before the disciplinary authority. On the contrary, he has clearly admitted to all the disciplinary charges preferred against him. That being the case, the plaintiff has been given and has indeed availed himself of a reasonable opportunity of being heard, in accordance with the principle enshrined in art 135(2), and GO 26 Cap D. **B** **C**

[58] In *Utra Badi*, the respondent, a hospital attendant at the Penang General Hospital, was issued a show cause letter dated 31 January 1991 by the appellant to institute disciplinary proceedings on the ground that his urine sample was positive of morphine. In his letter dated 7 February 1991, the respondent denied that he was a drug addict. On 20 March 1991, the appellant vide letter informed him that he had been dismissed, and of his right of appeal which he exercised by letter dated 26 March 1991, where he repeated his denial that he was a drug addict. His appeal was dismissed and he instituted proceedings against the appellants for wrongful dismissal in the High Court where decision was given in his favour, so also did the Court of Appeal. **D** **E**

[59] Leave to appeal to the Federal Court was granted on two questions viz: **F**

(1) whether a show cause letter issued by a public service disciplinary authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with art 135(2)?

(2) does art 135(2) require the relevant authority to afford the public officer an oral hearing? **G**

[60] Abdul Malek Ahmad FCJ (now PCA), delivering the judgment of the Federal Court, held that the show cause letter dated 31 January 1991 conveyed with sufficient clarity and certainty the contemplated punishment of which the respondent had been informed at the earliest available moment should he not be able to exculpate himself of the charge. He had been accorded every opportunity to defend himself as the respondent did by a letter dated 7 February 1991. However, he made no representation as regards the punishment though he has been made aware of. **H**

[61] His Lordship added that there is no separate right to make representations upon the punishment that ought to be meted out to the officer. The words 'it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer' in para 4 of GO 26 do not mean that there should be **I**

another separate hearing, as the first appellant was not required to make a finding of guilt. Therefore, no injustice has been occasioned to the respondent by the failure to hear his mitigation separately.

[62] The Federal Court also held that the right to be heard given by art 135(2) does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the appellant an oral hearing was a denial of justice.

[63] Applying the principles set out in *Utra Badi* to the facts and circumstances of the instant case, I am of the view that the defendants have occasioned no procedural unfairness in the entire decision which leads to the dismissal of the plaintiff from the Police Force.

CONCLUSION

[64] On the foregoing grounds, in my judgment, the answer to the aforesaid issue for determination is in the affirmative. I therefore hold that the plaintiff's claim is without merits and is hereby dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Izzaty Izzuddin